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method of regulating railroad
traffic

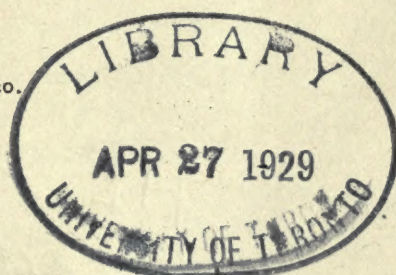
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THE
COMMUNITY OF INTERESTS
METHOD OF
Regulating Railroad Traffic

IN ITS HISTORIC ASPECTS.

By JOSEPH NIMMO, JR., LL. D.

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CONTENTS.

	PAGE.
The Unification of the American Railroad System	3
The Administrative Government of the American Railroad System.....	9
Peculiarities of the Railroad as a Highway of Commerce	11
History of Attempts to Regulate Transportation on Railroads.....	16
The Pooling System	19
Joint Traffic Associations.....	22
The Plan of Control Commonly Known as a "Community of Interests".....	22
The Anti-Trust Act of July 2, 1890.....	25
A Fundamental Principle Ignored	33
The Commercial and Political Results of Railroad Self-Government.....	37
The Political Aspects of the Question	43

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THE COMMUNITY OF INTERESTS METHOD OF REGULATING RAILROAD TRAFFIC IN ITS HISTORIC ASPECTS.

The public interest manifested in the method of regulating railroad traffic known as a "community of interests" suggest a brief statement in regard to the experiences and the existent circumstances and conditions which have led up to the adoption of that expedient.

The Unification of the American Railroad System.

From the year 1830 to about the year 1860 the railroads of the United States were, as a rule, disassociated. Each line pursued its own traffic policy, prescribed its own classification and rate sheets, avoided joint traffic arrangements with the lines of other companies and stoutly resisted the common use of cars and tracks. Different track gauges were adopted by the different companies in order to subserve the commercial interest of their several termini or points of intersection, as well for the purpose of avoiding entangling alliances incident to joint traffic.

This policy was for many years firmly main-

tained and defended by the leading railroad managers of the country. But from time to time inroads were made upon this constricted mode of conducting railroad transportation. During the Civil War, 1861 to 1865, the Government of the United States demanded the continuity of railroad transportation for the movement of men and munitions of war, and soon thereafter the commercial interests demanded a larger and less restricted method of conducting the internal commerce of the country by rail. There also arose a general and imperious demand for uninterrupted postal communications and for improved facilities for travel. These demands were gradually met by the railroad companies and in time the new arrangements acquired the sanction of both national and state law. The more important statutory enactments which have secured the practical unification of the American Railroad System are as follows :

1. The Act of June 15, 1866, entitled "An Act to Facilitate Commercial, Postal and Military Communication among the States," provided as follows :

✓ "That every railroad company in the United States whose road is operated by steam, its successors and assigns, be, and is hereby, authorized to carry upon and over

its road, boats, bridges and ferries all passengers, troops, government supplies, mails, freight and property on their way from one State to another State, and to receive compensation therefor, and to connect with roads of other States, so as to form continuous lines for the transportation of the same to the place of destination."

R. S., Sec. 5258.

This Act has been aptly designated "The Charter of the American Railroad System."

The general facilities for joint traffic afforded by the companies under the provision of the Act just quoted in a high degree accomplish the unification of the American Railroad System for the purposes of internal commerce, embracing the postal service, the Pullman car service and the express business.

2. For many years the continuity of railroad traffic was impeded by objections to allowing railroad bridges to be constructed across navigable streams. But the fact that the commerce over railroads was assuming even larger proportions than the commerce upon the rivers, at an early day, led the courts to overrule this objection upon grounds of justice and public policy. Subsequently, by special State and national statutes and eventually by the general act of Congress of September 19, 1890, the construction

of bridges over navigable streams was authorized throughout the United States. Thus was removed a serious obstacle to the unification of the American Railroad System.

3. States of the Union have by general as well as by special statute not only authorized railroad companies to cross their boundary lines and to engage in interstate commerce without let or hindrance, but have extended to such companies solicitous invitations to do so. This has contributed largely toward the unification of the American Railroad System.

4. The "Interstate Commerce Act," approved February 4, 1887, in its guiding principles, positive requirements and specific inhibitions is firmly based upon the idea of a deftly articulated American Railroad System. Its first section provides that it shall apply to the transportation of passengers or property "for a continuous carriage or shipment from one State or Territory to any other State or Territory, or from any place in the United States to an adjacent foreign country, etc.," indicating clearly that the act was intended to apply to an existent and intimately connected system of railroad transportation.

In its second section, which is at once considerate, mandatory and enabling, the Interstate

Commerce Act provides that the railroads of the country "*shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith.*"

Section 6 of the Interstate Commerce Act requires the railroad companies to file joint rate contracts with the Interstate Commerce Commission and to maintain such joint rates involving the unification of traffic. This section also provides for the publication of joint tariffs of rates.

Section 7 of the same act specifically provides for continuous traffic over connecting lines, and clearly authorizes agreements and combinations involving the common use of tracks, cars, locomotives and depots, and the harmonious management of the entire apparatus of railroad equipment, by prohibiting any act which would tend to prevent such practical unification of the entire railroad system of the United States.

In a word, the requirements of the Interstate Commerce Act relates to incidents of a closely connected and co-operative American Railroad System, instituted by the railroad companies and administered by them.

5. The Federal judiciary has fully recognized the American Railroad System in all its logical sequences of commerce and transportation. Railroads operated by receivers appointed by the Federal courts have, in every instance, under judicial authority, observed the rules of joint traffic commonly in vogue.

At the end of the year 1860, which approximately marked the close of the period of disassociated railroad operation, the total railroad mileage of the United States amounted to 30,626 miles. The railroad mileage of the country on June 30, 1900, amounted to 193,345, miles, or more than six times the mileage at the end of the period of disassociated railroad operations.

In the light of the foregoing facts there are two things which we may safely postulate in regard to the railroad transportation interests of this country :

1. The unification of the American Railroad System has been the outcome of an evolution responsive to the social, political, postal, commercial, industrial and military necessities of the country, and as such it has been fully legalized.

2. No method of governmental regulation which would in any manner or degree disassociate the railroads of the United States would for a moment be tolerated by the people of this country.

The Administrative Government of the American Railroad System.

It was impossible that the orderly conduct of a system of transportation so complex, so intimately associated, and so enormous, could long be maintained without some sort of administrative control. The American Railroad System of to-day was not evolved peacefully, or through any undisturbed flow of events. At every stage of its progress its development has been marked by harsh, frictional resistances and fierce contests. The physical unity of the different railroad lines has been accomplished and exists to-day almost as a perfect system of transportation, but the unification of the traffic interests of the railroads has presented much more difficult problems. The incidents in the transition from a state of disassociated traffic to one of intimately associated traffic have been, at times, appalling. The difficulties encountered have arisen mainly from the fact that the juncture of coterminous lines begat a fierce and all-pervading competition of rival lines and rival centres of traffic. At times the general railroad managers were compelled to remit their rate-making authority to thousands of traffic agents, in order to prevent traffic from being deflected to rival lines. In

the general melee the traffic agents observed no prescribed tariff, and shippers throughout the country actually dictated the rates. The inevitable result was that rates fell below the actual cost of transportation, and bankruptcy stared all the leading companies in the face.

But a much more serious result ensued. The public, and particularly the great commercial centres of the country, suffered greatly from this demoralization, for it led to wild and outrageously unjust discriminations with respect to persons, places and commodities. This produced general disorder. At times the internal commerce of the country was paralyzed; hence there arose an imperious public demand that these struggles should cease, and that published rates, free from unjust discrimination, should be maintained. The overshadowing difficulty which presented itself was that no single company was able to exercise administrative control of the situation. The best informed railroad traffic managers were for years at their wits' ends. From time to time they would meet together, restore rates and resume the rate making function, but only again to experience the same downward slide to ruinous rates and commercial disorder. At length it was discovered that competition between railroads is, by virtue of the conditions just men-

tioned, divested of that caution which ordinarily attaches to ownership. It is simply competition run mad, and as such the proper subject of restraint through some form of co-operative self government.

Peculiarities of the Railroad as a Highway of Commerce.

There is a French maxim, "The cause of the cause is the cause of the thing caused." The underlying cause of the troubles just described plainly exists in the physical characteristics of the railroad as a highway of commerce. All the other known commercial highways—wagon roads, canals, rivers, lakes and the ocean—are free highways of commerce not only to the shipper, but also to the carrier. Every person may place his vehicle or vehicles of commerce upon such free highways, and compete at will with all other carriers. But the railroad, while always a perfectly free highway of commerce to the shipper, is not, never was, and never can be a free highway of commerce to the carrier. This arises from the fact that the pathway of the railroad is no wider than the tread of the wheel of the vehicle which moves upon it. It is a mere *rail* way, as distinguished from a *high* or *public* way. This peculiarity or infirmity sharply discriminates the

railroad from all other highways of commerce. Considerations of safety and efficiency absolutely forbid that it shall be free to every and any carrier, and renders it absolutely necessary that the entire equipment of every operating company shall be under the absolute control and management of that company. Competition as between carriers is eliminated upon each particular railroad, and competition between the different railroads is exerted *en masse*.

There are certain other economic facts of experience based upon the physical characteristics of the railroad which absolutely and sharply discriminate it from all other kinds of highways of commerce.

(a) In order to secure the orderly conduct of traffic railroad companies have found it absolutely necessary to make and publish classifications of freight, and rate tariffs applicable thereto. These practices have been formulated into statutory requirements. No such practice prevails on free highways of commerce.

(b) The rates on absolutely free highways of commerce may be changed daily and hourly and may be manipulated in almost every conceivable way which the struggles of competitive strife may suggest, but on railroads due public notice

must be given of every intended change of rates by raising or lowering them. This practice originated with the railroad companies as a necessary administrative measure, and has acquired the sanction of law.

(c) The railroad companies found that it subserved the public interests, prevented public discontent and secured equitable and economic purposes to grade their charges in accordance with the length of the haul, this rule being departed from only under the stress of pre-existent economic conditions. The conditional long and short haul rule of the Interstate Commerce Act is based upon this practice. No such rule obtains on free highways of commerce.

(d) Carriers on free highways of commerce may remove their entire equipment of transportation from one field of enterprise to another, whereas the railroad company enjoys no such freedom of selection.

(e) Owners of vehicles of commerce on absolutely free highways of commerce may at any time when traffic is unremunerative withdraw from business altogether, whereas the railroad company like the babbling brook must "go on forever," even though its continuation in business involves bankruptcy and the wreck of the entire capital invested in it.

(f) The fact that the building of railroads has involved the appropriation of lands under delegation of the sovereign power of eminent domain, has given rise to the legal requirement that rates shall be reasonable and non-discriminative to a degree not applicable to free highways of commerce.

(g) The fact that the railroads of the country are physically connected and are compelled to sustain to each other partnership relations incident to joint traffic, renders absolutely necessary traffic agreements between them in the nature of self restraint.

These peculiarities of governing conditions have certain economic consequences of the highest public interest.

First. The free competition of carriers on free highways of commerce is self regulative and conservative. No commercial disorder results from such competition. But in case of railroad transportation, the competition of each road being thrown *en masse* against that of its competitors, such competition, instead of being self-regulative, tends inevitably to rates destructive of railroad property interests, and to fluctuations and discriminations which throw the trade and industry of the country into confusion.

Second. All experience has proved that the

orderly conduct of the internal commerce of this country absolutely requires that the destructive and disorderly results which inevitably ensue from unrestrained railroad competition must be prevented by means of some sort of conventional arrangement as between the competing lines. In no other way can the integrity of the united American Railroad System be preserved.

In view of the foregoing facts, the American Railroad System may be said to have had a cosmic development of its own, its physical characteristics and the conditions governing its operations being entirely peculiar to itself. The task which has confronted railroad managers has been to devise a method for the regulation of joint traffic conformed to the peculiar characteristics and conditions governing transportation by rail. On the other hand, the task which has confronted the legislator has been to frame a system of laws adapted to those peculiar characteristics and conditions. In the performance of these duties the railroad manager and the legislator alike have made and corrected errors incident to a task so highly problematical and so difficult.

History of Attempts to Regulate Transportation on Railroads.

The developed fact that competition between railroad companies as carriers is not subject to the conservative conditions which regulate competition on free highways, at an early day led to the conviction that some conventional mode of control, through agreement or co-operation, must be adopted. Drawn together in the bonds of an inseparable physical unity, this was inevitable, and yet it was regarded with serious apprehension.

One of the first and most notable efforts at self-control occurred in the month of October, ✓ 1874, when Commodore Cornelius Vanderbilt, president of the New York Central & Hudson River Railroad Company; Mr. Hugh J. Jewett, president of the Erie Railway Company, and Mr. Thomas Scott, president of the Pennsylvania Railroad Company, together called on Mr. John W. Garrett, president of the Baltimore & Ohio Railroad Company, at his home in Baltimore, for the purpose of conferring with him in regard to the enormous problems of commerce and of transportation which confronted them all. Messrs. Vanderbilt, Jewett and Scott came with a recommendation to Mr. Garrett that the four presi-

dents should agree among themselves as to the rates which should be charged by the several competing lines to and from Boston, New York, Philadelphia and Baltimore, in their commerce with the towns and cities of the great West. The subject was earnestly debated. In stating his dissent to the proposed plan, Mr. Garrett expressed the opinion that it would be regarded by the people as a combination against the public interests, and be likely to excite hostile action against the railroads in State Legislatures, in Congress and in the Courts. This view was accepted by the others; and it was correct, for the general public had no appreciation whatever of the difficulties into which a physically united national system of transportation had plunged the managers of railway traffic. The senseless cry had even then been raised that the internal commerce of the country was absolutely under the control of a few railroad magnates, while the same "magnates," almost in despair, were seeking to establish by co operation, some sort of restraint against a struggle which individually they were powerless to control—which was plunging them into ruin and driving the commercial and industrial interests of the country into the direst disorder and demoralization, for which they were held responsible. Thus an

appalling political problem was added to an economic problem. The railroad managers of the country clearly realized that they were between the lower millstone of an insuperable economic disability and the upper millstone of undeserved public disapprobation.

But the duty of protecting the commercial interests of the country against injustice and disorder confronted them, and the necessity of devising some plan of relief was imperative.

One of the earliest modes of escape from the dilemma which occurred to some of the leading railroad officials of the country was to extend their lines so as to gain control of traffic within clearly defined geographical areas and thus circumvent the competitive conditions which were drawing them all toward the abyss of ruin. But that plan failed utterly. Traffic continued to pursue the courses dictated by shippers and rates steadily declined.

For awhile formal agreements as to the rates which should prevail over rival lines were resorted to, but without any practical result for good.

At last it became evident to all that the thing needed was some just and proper conjoint and co-operative system of self-control, sufficiently

potential to maintain the orderly conduct of the most complex and extensive system of transportation that the world had ever seen. Three plans for effecting that object have been attempted.

The Pooling System.

The first method of railroad self-government through associated effort was that commonly known as the "pooling" or apportionment of traffic or of the receipts from traffic. The rationale of this plan is as follows: It had been proved by the hard lesson of experience that the maintenance of the orderly conduct of traffic and of the internal commerce of the United States absolutely requires that competing railroads must first agree among themselves as to the rates which they shall charge, subject, of course, to the inevitable limitations of their environment. It had also been proved by the lessons of a stern experience that rate agreements can be maintained only when based upon antecedent agreements as to the share of the traffic which shall be secured by each competitor. The division or apportionment of traffic was inaptly and most erroneously styled "pooling" by certain railroad managers and to this unfortunate designation the trouble which has since ensued is almost entirely attributable.

The plan of dividing traffic or the receipts from traffic between particular termini and junction points had been successfully practiced for several years ; but it was not until the year 1875, that the system of equitably dividing competitive traffic or the receipts from such traffic throughout extensive areas or sections of the country was devised by Albert Fink, an accomplished traffic manager, and a man whose splendid ability, high character and imposing personality at once commanded respect and confidence. The theory and practice of the pooling system is admirably described by Mr. Fink in several reports which he submitted to me in my official capacity as Chief of the Division of Internal Commerce and subsequently as Chief of the Bureau of Statistics in the Treasury Department of the United States. These statements appear in my several reports on internal commerce issued between the years 1875 and 1885.

The pooling system subserved important purposes. It defended the traffic interests of the weaker as well as of the stronger lines. It was really more conservative of the interests of commerce and industry than of those of transportation. That it greatly allayed existing troubles both of transportation and of commerce is beyond all question. During the period of about

twelve years when it prevailed the railroad transportation facilities of the country were greatly improved and extended and the commercial interests of the country greatly prospered. Many of the leading merchants and trade organizations of the country lauded the pooling system for its efficiency in abating unjust discriminations and other causes of disorder in the conduct of the commerce of the country. But though devised, and for years administered, by a man of genius and of indomitable perseverance and though embodying features of permanent value, it ultimately failed to accomplish the enormous task of supplying a satisfactory plan of self control for the American Railroad System. Besides by the fifth section of the Act to Regulate Commerce, approved February 4, 1887, the plan of self-government devised by Mr. Fink was declared to be illegal. This statutory prohibition was suggested and carried through by one of those spasms of demagogism which of late years have retarded progress and cast a blight upon American law-making. The ablest of the opponents of the apportionment scheme has since seen the error of his opposiiton and has acknowledged it.

Joint Traffic Associations.

The leading trunk lines next had recourse to joint traffic associations upon the basis of the rates which should be charged by competing lines. Improved methods of administration and new safeguards were adopted for carrying such agreements into effect. But just as this plan of self-government was most promising of beneficial results it was arrested by the operation of a statute entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," approved July 2, 1890, and commonly known as the Anti-Trust Act."

There has never been placed upon the statute books of the United States a more glaring legislative misadventure than the Act of July 2, 1890. It constitutes a serious impediment to the just and beneficent solution of the railroad transportation question in this country. This is hereinafter explained.

The Plan of Control Commonly Known as "Community of Interests."

By the operation of the Acts of Feb. 4, 1887, and July 2, 1890, above cited, the spectacle was presented to the country of a vast and intimately connected system of transportation created in obedience to a coercive public demand and fully

legalized by State and National governments, but denied by the natural government the right of self-control through carefully devised administrative expedients clearly dictated by the lessons of experience and set in motion by the railroad managers in order to protect the properties entrusted to their care, and at the same time to protect the commercial and industrial interests of this country against ruinous discrimination and disorder. The experiment of leaving the railroads of the country to the results of unrestrained competition could not possibly be repeated ; experience had time and again proved that the results of that policy could be none other than disastrous. The only legal and apparently practical recourse against the inhibition of the fifth section of the Interstate Commerce Act, and the "Anti Trust Act," of July 2, 1890, appeared to be that of a partial merger of the financial interests of certain of the more important trunk lines. This plan has been adopted, and is commonly known as that of a "Community of Interests." It is an outcome of that community of traffic interests which had its origin in joint traffic arrangements resulting in the continuity of railroad traffic throughout the United States,—an evolution responsive to the clearly expressed commercial and industrial needs of the country.

As yet the "Community of Interests" plan is in its experimental stage, having been first adopted only about a year ago. Thus far its results have been peaceful, and beneficent toward the interests of commerce and industry and conservative also of the railroad interests. The obligations assumed by the different companies seem to involve such compromise of individual independence as usually characterizes healthful restraint. It is not my present purpose to defend the new plan of federation or to predict its success, further than to say that it is the outcome of the logic of events, that it has thus far developed no evil tendencies, that its purpose of preserving the orderly conduct of the intimately connected American Railroad System is laudable, and that it promises exemption against wars of rates which would inevitably bring disaster to the commercial, industrial and transportation interests of this country. The introduction of a referee for the purpose of harmonizing differences of opinion in regard to question of general administration will undoubtedly tend toward the orderly conduct of the American Railroad System.

The Anti-Trust Act of July 2, 1890.

In view of the fact that the Anti-Trust Act of July 2, 1890, has exerted so important an influence in compelling recourse to the "Community of Interests" plan for protecting the commercial and transportation interests of this country, a brief account of its legislative and judicial history appears proper.

The title of the Act of July 2, 1890, is "An Act to protect trade and commerce against *unlawful* restraints and monopolies." The first section of the Act, however, provides that "*Every* contract, combination, in the nature of trust or otherwise, or conspiracy, in restraint of trade or commerce among the States, or with foreign nations, is hereby declared to be illegal."

The interpretation of this Act by the Supreme Court of the United States is based upon its precise terms, which make no distinction as to the character of the restraint imposed, whether just or unjust, reasonable or unreasonable. In reply to objections based upon the extreme inconvenience of this construction of the statute, the Court threw the entire responsibility for results upon the legislator.

The import of the Act, in so far as relates to contracts for the purpose of restraining compe-

tition between rival railroads, has been determined in two notable cases, namely, the "Trans-Missouri Case," decided March 22, 1897 (166 U. S., 290), and the "Joint Traffic Case," decided October 24, 1898 (171 U. S., 505), the decision of the Court being that even those contracts which the lessons of a long and eventful experience had proved to be absolutely necessary in order to maintain the integrity of the American Railroad System and the orderly conduct of the commercial and industrial affairs of the country are prohibited by the statute.

The members of the Federal judiciary differed widely among themselves upon the elementary proposition of law as to whether the words "every contract" should be held to include reasonable as well as unreasonable contracts in restraint of trade. All but one of the judges who heard the case in the two circuit courts and circuit courts of appeal, and four of the nine justices of the Supreme Court of the United States held that the statute ought to be so interpreted as to concede that the contract in question is "valid under the general law." They also maintained that the established rule of interpretation that contracts imposing reasonable restraints are lawful ought to be applied in determining the sense of this statute. But the five

justices who rendered the decision of the court ruled that the language of the law "*Every contract in restraint of trade*" sets aside the general law and revokes the established rule of interpretation.

The dissenting justices strenuously maintained that the decision is "that the Act of Congress is a departure from the general principles of law and violative of the elementary principles of justice," but the five justices who rendered the decision of the court, while not denying this, held that the plain language of the law cannot be amended "by a process of judicial legislation wholly unjustifiable" and that "public policy in such a case is what the law enacts," adding that if the law ought to read otherwise "Congress is the body to amend it, and not this court by a process of judicial legislation wholly unjustifiable."

Thus the Federal judiciary differed as to the construction of a statute in a manner involving not only the delimitation of the powers of the legislative and judicial branches of the Government, but also as to a question involving high considerations of public policy and "the elementary principles of justice." Differences so acute upon fundamental principles of law and of government seem to indicate that the inhibi-

tion of the Act of July 2, 1890, would more appropriately have been the subject of constitutional amendment than of statutory enactment.

It seems also to go without saying that a subject of such vital political importance, relating as it does to fundamental principles of justice and of government should have been preceded by a thorough and impartial congressional investigation, but no such inquiry preceded the act, although it related to a new and very complex question of public policy. The Interstate Commerce Act of February 4, 1887, which relates to matters of much less importance was the outcome of a thorough and impartial congressional investigation. In Great Britain a matter so deeply affecting established principles of justice and of governmental procedure would have required two or three years of parliamentary and expert inquiry, but this revolutionary bill was rushed through Congress without any special investigation in which the vast commercial, industrial and transportation interests of the country had any opportunity whatever to be heard.

The force of the foregoing remarks is emphasized by the fact that it was not until by the Act of July 18, 1898, that a non-partisan Industrial Commission, comprised of Senators, Members

of Congress and specialists, was formed for the purpose of considering the whole question of combinations and trusts, "so-called," and the elementary work of determining the distinction between combinations promotive of the public interests and combinations opposed to the public interests. It is certain that Congress has never yet determined this line of distinction with respect to any particular industry or business. Besides, the House of Representatives of the last Congress undertook the initial work of proposing a constitutional amendment, one of the main purposes of which was to enable Congress to determine the distinction between combinations which should be held to be legal and those which should be held to be illegal.

In view of the fact that restraints and limitations are the very essence of human law and government, it appears that Congress committed itself to precipitate action in passing, without any formal inquiry[as to its necessity or as to its probable effects, a law which, by the consensus of judicial opinion, overturns a fundamental principle of the common law and repudiates an established principle of justice and liberty. At one fell swoop this Act of July 2, 1890, eliminated the distinction between just and unjust, reasonable and unreasonable, beneficent and baneful restraints.

Besides, as pointed out in the report of the House Committee on the Judiciary of the 56th Congress [Report No. 1506, page 1], the Act of July 2, 1890, utterly fails to regulate industrial trusts (U. S. vs. E. C. Knight Co., 156 U. S., 1), which beyond all question was the fundamental object of the statute.

In the light of all the facts thus presented, it appears proper to characterize the Act of July 2, 1890, as a legislative misadventure.

In its careful and protracted consideration of the Act of July 2, 1890, the judiciary was hopelessly divided upon the concrete question as to whether it was or was not the intention of Congress to include such contracts between railroad companies as those involved in the Trans-Missouri and Joint Traffic cases. Furthermore, the five justices who delivered the opinion of the court frankly admitted that, "looking simply at the history of the bill from the time when it was introduced in the Senate until it was finally passed, it would be impossible to say what were the opinions of a majority of the members of each House in relation to the meaning of the bill." The five justices were therefore forced to the conclusion that the meaning of the Act must be "determined from the language used therein." This clearly evinces the crudity of the Act.

I have characterized the Act of July 2, 1890, as revolutionary. This it appears to be in a double sense. As asserted by the dissenting justices and not denied in the opinion of the court it "is a departure from the general principles of law" and abrogates a rule of interpretation which discriminates between contracts which impose reasonable, just and beneficent restraints upon trade and conspiracies or contracts which are fraudulent, opposed to the public interests or which for any reason are *contra bonos mores*. It is also revolutionary in that it ousts the Federal judiciary from the power to determine in any and every case whether a contract in restraint of or regulative of trade and called in question is just or unjust, reasonable or unreasonable, in accord with the public interests or opposed to the public interests. All such questioning is eliminated by the fiat of law. In the light of these facts it also appears proper to regard the Act of July 2, 1890, as a legislative misadventure.

Furthermore the government has stultified itself, by first legalizing the measures adopted for the purpose of securing the unification of the traffic interests of the country and then by the Act of July 2, 1890, declaring unlawful measures which the lessons of experience had proved to be necessary to that end, and had also proved

to be beneficent and in no manner inimical to the public interests.

In all the legislative and judicial proceedings embracing the enactment of the law of July 2, 1890, and its judicial determination, one fact of overshadowing importance appears, namely, that the circumstances and conditions which justified and actually compelled the contract entered into between the railroad companies were either lost sight of or were inadequately considered. In other words, no proper account was taken of the fact that from the beginning such contracts were entered into from an imperative force of circumstance and with the sole object in view of providing a restraint against evils which had proved to be destructive of the commercial and industrial interests of the country and ruinous to the railroad interests.

It is a fact worthy of note in this connection, that the Act of July 2, 1890, as clearly forbids labor organizations whose operations restrain the internal commerce of the country as it does railroad associations.

A considerable majority of the jurists who passed upon the Act of July 2, 1890, in the two cases cited, appeared to think that Congress intended to enact that "Every contract *unjustly* in restraint of trade is unlawful." This appears

probable from its title which specifies "unlawful restraints." An amendment of the law inserting the word *unjustly* as above indicated would bring it into conformity with established principles of liberty and of justice and at the same time legalize an expedient for maintaining the integrity of the American Railroad System and for protecting the commercial and industrial interests of the country against disorder.

It is to be earnestly hoped that Congress, at its next session, will see its way clear to make this amendment to the statute. It is also to be hoped that the Congress of the United States will never again commit itself to the passage of any Act involving the commercial, industrial and transportation interests of this great nation except as the result of a thorough and impartial legislative investigation.

A Fundamental Principal Ignored.

There is a question of principle involved in the subject of railroad self-government, which is based upon economic considerations and the constitution of the human mind, but which is habitually ignored or sadly perverted. I refer to the question as to the limitation of competition by combination. In all our social and industrial pursuits we are actuated by two opposing motives.

Individuality leads men to struggle with their fellows for the acquisition of everything worth having and holding, for we live in a world in which we are all debating. On the other hand, an equally virile human trait, the social instinct, leads men to associate themselves together in co-operative enterprise. Since the world began man's faith in his fellow-man was never before so pronounced as it is to-day. This is manifested in innumerable forms of social and industrial association. Out of these conflicting dispositions has sprung the habit of competition and the habit of combination. The struggle between these forces has begotten two maxims, namely, "competition is the life of trade" and "in union there is strength." Neither of these maxims, however, affords an infallible guide in the affairs of life. In many instances competition kills trade by constriction. There are also combinations for good and combinations for evil. Many combinations perish of their own lack of vitality. Besides, the life of trade is a subjective element. It has its origin and force in human intelligence, ambition and acquisitiveness. Combination and competition are only modes of interaction. They are mutually regulative of each other. Together they operate as the balance wheel of self-government. The practical question which

arises in each concrete case is one of differentiation, selection and adaptation. The easy and favorite mode of escape out of this somewhat difficult task is to rely upon the shallow adage "competition is the life of trade," and thus slide to the conclusion that every restraint upon competition is necessarily a restraint upon trade. This assumption never had any substantial foundation in economics or in trade. From time to time during the last four hundred years jurists, keen in their perceptions of economic truth and of commercial considerations, have denied it or treated it with deserved scorn. In the case of *Mitchell vs. Reynolds*, decided about the year 1711, nearly two hundred years ago, and reported in "Smith's Leading Cases," the policy of the law of England at that time is stated as follows ;

"The present doctrine is that while contracts in total restraint of trade are void, yet if the restraints imposed be practical, reasonable and founded on good consideration they are valid and will be enforced."

In our own times, Judge Howe, of Wisconsin, a distinguished jurist, who afterwards became a Senator of the United States, denounced the miserable dogma that "competition is the life of trade" in the case of *Kellogg vs. Larkin* [3

Pinney, Wis. Rep., 150], a case which had no reference to railroad transportation.

“ If it be true also that competition is
“ the life of trade, it may follow such prem-
“ ises that he who relaxes competition com-
“ mits an act injurious to trade ; and not
“ only so, but he commits an overt act of
“ treason against the commonwealth. But
“ I apprehend it is not true that competi-
“ tion is the life of trade. On the contrary,
“ that maxim is the least reliable of the host
“ which may be picked up in every market-
“ place. It is, in fact, the shibboleth of
“ mere gambling speculation, and is hardly
“ entitled to take rank as an axiom in the
“ jurisprudence of the country. I believe
“ universal observation will attest that for
“ the last quarter of a century competition
“ in trade has caused more individual dis-
“ tress, if not more public injury, than the
“ want of competition.”

The fundamental principle ignored is that co-
operation or combination is the natural antidote
to competition when it becomes destructive of
private interests and detrimental to the public
interests. The manner in which and the ex-
tent to which the remedy shall be applied is
eminently a practical question to be determined
by the governing circumstances in each particular
case.

My careful study of the railroad question during the last thirty-five years has convinced me that unrestrained railroad competition has been an unmitigated evil in this country, and that the co-operative restraints adopted by railroad companies have been protective of the public interests.

The subject is, however, too vast and too important to be definitely concluded by any one man or set of men. It is eminently a subject for careful consideration by statesmen, and to be determined in the light of all its commercial, economic and political aspects. I heartily commend it to the attention of American legislators, not as a mere feature of the illimitable "trust question," but as a great question of public policy to be subjected to that excellent rule of procedure—"one thing at a time."

The Commercial and Political Results of Railroad Self-Government.

The development of railroad transportation in the United States has been the main instrumentality in the grandest commercial, industrial and territorial development ever seen on this planet. This is clearly indicated by the following illustrative data :

The reduction in rates during the period of

railroad unification and self-government is indicated by the following statement for the years 1870 and 1898, the latter being the year when by the decision of the Supreme Court rendered October 24, 1898, the associations mentioned were finally declared to be unlawful.

Average Receipts per ton, per mill, on railroads of the United States during the years 1870 and 1898.

RAILWAY LINES.	1870	1898
	Cents.	Cents.
Lines East of Chicago.....	1.61	55
Western and Northwestern Lines	2.61	94
Southwestern Lines.....	2.95	94
Southern Lines.....	2.39	62
Transcontinental Lines	4.50	99
Average	1.99	72

This data is taken from the Statistical abstract of the United States, published by the Chief of the Bureau of Statistics.

The average rate for 1898 was only 36% of the rate for 1870; conversely the rate for 1870 was 2.76 times the rate for 1898.

The actual reduction, 1.27 cents per ton per mile, was nearly double the present rate per ton

per mile, this reduction (1.27 cents per ton per mile) applied to the total number of tons carried one mile for the year ended June 30, 1890, as reported by the Interstate Commerce Commission, namely, 141,599,157,270 mileage tons amounts to \$1,798,309,287 which is \$749,052,964 in excess of the amount actually collected from freight during the year mentioned.

While conferring such enormous benefits when the commercial and industrial interests of the country, the railroad companies have advanced the wages and otherwise improved the condition of their employes.

The passenger traffic of the country doubled during the eighteen years from 1882 to 1900.

The number of tons of freight carried and the number of tons of freight carried one mile in the United States, during the years 1860, 1882, 1890, and 1900, was as follows :

YEAR.	NUMBER OF TONS CARRIED.	NUMBER OF TONS CARRIED ONE MILE.
*1860.....	100,000,000	
1882.....	360,490,375	39,302,209,249
1890.....	701,344,437	79,192,985,125
1900.....	1,101,680,238	141,599,157,270

* Estimated.

This shows that the volume of railroad freight traffic during the year 1900 was eleven times the volume of such traffic during the year 1860 and more than three times the volume of the traffic during the year 1882—only eighteen years before.

The railroads having been the chief instrumentality in the development of the agricultural and mineral resources of the country as well as of its commercial and industrial interest, it is a matter of interest to note in this connection the increase in the wealth of the country as estimated by the various decennial censuses. This is shown as follows :

1850.....	\$ 7,135,780,228
1860.....	16,159,616,068
1870.....	30,068,518,507
1880.....	43,642,000,000
1890.....	65,037,091,197
Estimated for 1900.....	94,000,000,000

The total railroad capital of the United States is stated by the "Railway Association" at \$12,553,000,000. This is about thirteen per cent of the estimated total wealth of the country in the year 1900.

The growth of the railroad mileage of the United States is exhibited as follows :

YEAR.	Miles in Operation.
1832.....	229
1840.....	2,118
1850.....	9,021
1860.....	30,626
1870.....	52,922
1880.....	93,262
1890.....	166,703
1900.....	193,345

The total railroad mileage of all Europe in the year 1899 was 175,821 miles, and of the world about 470,000 miles, showing that the American Railroad System embraces about 41 per cent of the total railroad mileage of the world.

The United States Government collects no data in regard to the value of the internal commerce of the country. Any strenuous attempt to do so would clog the wheels of the largest and most virile commerce on the globe. From available data it is estimated that the value of our internal commerce now amounts to somewhat more than twenty-five thousand million dollars (\$25,000,000,000) a year, or about twice the value of the entire American Railroad Sys-

tem. It amounts to more than ten times the value of the foreign commerce of the country.

During the last forty years the vast arid region extending from the 100th meridian of the East to the Sierra Nevada Range at the West, has been brought into close commercial relationship with the rest of the country and with all parts of the world by means of railroads. The annual value of the commerce of that section with the rest of the country amounts to fully \$440,000,000 a year. This has been a commercial creation of the last fifty years. Its value exceeds the value of the commerce of the United States with Asia, South America, Central America and the West India Islands.

The Pacific Coast has also exhibited an enormous commercial development and has been brought into close commercial communication by rail with all parts of the United States between the Sierra Nevada Range and the Atlantic Coast by means of railroad construction. Just now we have news that California fruit is driving Spanish fruit out of the markets of Paris, although the fruit of the Golden State is transported 6,000 miles, across the American Continent and across the Atlantic Ocean, while that from Spain travels only 600 miles.

The foregoing facts tell of victories of peace

in this country which have no parallel in the world's history.

The railroad of to-day is a vastly improved instrument of commerce as compared with the railroad of 1860 or of 1870. It affords greatly improved facilities for the continuity of traffic by virtue of its physical and traffic unification. The facilities for the collection and distribution of freights have also been greatly improved, the average speed of trains has been increased, and, as already shown, the cost of transportation has been wonderfully reduced.

THE POLITICAL ASPECTS OF THE QUESTION.

The stupendous work of securing the physical unity of the American Railroad System and the much more complex and difficult task of devising ways and means whereby the continuity and practical unification of the railroad traffic of the country have been secured, have never been the subject of governmental provision, supervision or devisement. These grand achievements have been wrought out by the inventive genius of the country, and by able and painstaking administrative and executive railroad managers, guided solely by the lessons of experience and the compulsion of clearly-defined public demands. To the extent to which such arrangements have met

the commercial and industrial necessities of the country they have been legalized by the Act to Regulate Commerce and by other statutes, state and national.

Beyond all question the work of directing the evolution of the American Railroad System and of determining the course of the development of the internal commerce of the United States has been and is to-day essentially an administrative work completely outside the beneficial or proper exercise of governmental powers. It has been and must continue to be an expression of commercial and industrial interaction. The genius of our political institutions proclaims this doctrine. The lessons of experience prove conclusively that the function of the government in so far as relates to the protection of internal commerce and transportation should be confined to the legalization of usages proved to be for the public welfare, and to regulations having for their object the arresting of injustice and the prevention of evils which, by the analogies of the law are properly the subjects of governmental concernment in the ordinary course of judicial procedure. To this function has been happily added those supervisory and mediatorial offices whereby the Interstate Commerce Commission has been enabled to accomplish so much

by regulations of a judicial character, by conciliation and by moral restraints for the peaceful and orderly conduct of transportation by rail.

The practical unification of the railroad traffic of the United States has been and is to-day essentially a co-operative work as between the different railroad companies, in this way all the beneficent features of joint traffic management have been gradually wrought out, and held in harmonious relation to the commercial and industrial interests of the people. Progress toward this consummation has been marked by stormy passages and by enormous losses of property values on the part of the railroad companies, but in so far as relates to the commerce and industry of the country, the evolution, while marked by spasmodic disturbances, has been under the circumstances, to a phenomenal degree quiescent and beneficent. The fact that the means which have been adopted for securing the orderly conduct of the American Railroad System have been in the highest degree promotive of the public interests, utterly repels every suggestion and influence which looks to paternalistic governmental methods of administration or to political attempts to dictate the course of the commercial and industrial development of this country through any autocratic exercise of governmental

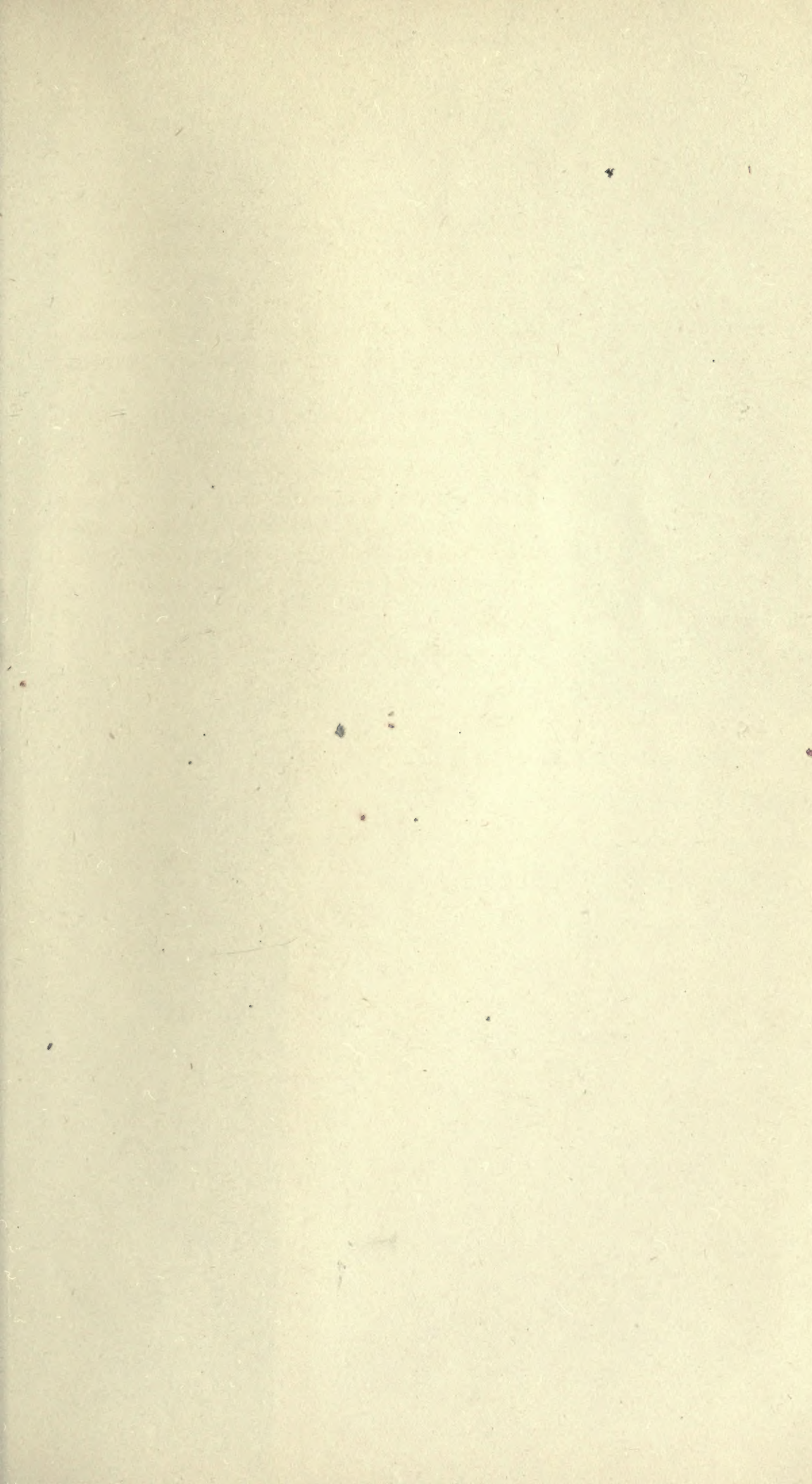
power. In his first message to Congress, transmitted December 8, 1801, President Thomas Jefferson said:

“Agriculture, manufactures, commerce and navigation, the four pillars of our prosperity are the most thriving when left most free to individual enterprise.”

If Mr. Jefferson could return to the scenes of this world he would undoubtedly add to the above enumeration RAILROAD TRANSPORTATION as being by far the most conspicuous illustration of his noble faith in the conservatism which inheres in the untrammelled interaction of commercial and industrial forces.

WASHINGTON, D. C.,

AUGUST 7, 1901.



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